United States Court of Appeals

for the Second Circuit

APPELLEE'S REPLY BRIEF

74-2559

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

RAYMOND MILLS,

Plaintiff-Appellant,

and

HARRY F. SIMMONS,

Plaintiff,

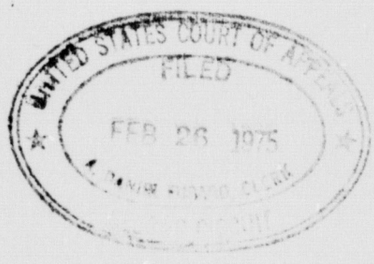
74-2559

- against -

THE LONG ISLAND RAILROAD COMPANY, et al.,

Defendants-Appellees.

BRIEF OF DEFENDANT-APPELLEE,
UNITED TRANSPORTATION UNION



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UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

RAYMOND MILLS,

Plaintiff-Appellant,

and

HARRY F. SIMMONS,

Plaintiff,

74-2559

- against -

THE LONG ISLAND RAILROAD COMPANY, HAROLD J. PRYOR, THOMAS J. BUTLER, WALTER DAY, MERRILL J. PIERCE, MARTIN BURKE, JAMES MOON and SAL BARBUTO, constituting a majority of the Officers of the UNITED TRANSPORTATION UNION (T),

Defendants-Appellees,

On Appeal from the United States District Court for the Eastern District of New York

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Brief of Defendant-Appellee, UNITED TRANSPORTATION UNION

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Statement of the Case

This is an appeal by plaintiff, Raymond Mills, a trainman employed by defendant, The Long Island Railroad Company (hereinafter referred to as "LIRR") and a member and officer of the defendant United Transportation Union (hereinafter referred to as "Union") from so much of the judgment entered on November 1, 1974 (127a) as directs summary judgment dismissing plaintiff's complaint upon the Order (117a-126a) of Hon. Orrin G. Judd of the United States District Court for the Eastern District of New York. The other plaintiff, Harry F. Simmons, is not a party to this appeal.

The case came before U.S. District Judge Judd on plaintiff's motion to remand to the State Court, plaintiff's motion for a preliminary injunction (which plaintiff originally made in the Supreme Court of the State of New York, Suffolk County) and the motion of defendants for dismissal of the complaint, or in the alternative to have summary judgment in defendants' favor (which defendant LIRR originally made in the Supreme Court of the State of New York, Suffolk County) for dismissal of plaintiff's complaint (originally brought in Supreme Court of the State of New York, Suffolk County). There

was also an informal motion for contempt against the LIRR on the ground that the plaintiff Mills was dismissed despite a stay issued by the State Supreme Court. A hearing was held on June 14, 1974 before Hon. Orrin G. Judd and thereafter he rendered a memorandum decision and order dated November 1, 1974 denying the plaintiffs' motion to remand, denying plaintiff Mills' motion to hold the LIRR in contempt and granting defendants' motion for summary judgment dismissing the complaint.

The controversy relates to the procedures for disciplining employees of the LIRR for "run failures" (i.e. for unexcused absence from duty at the time the employee's train is due to depart) as set forth in letter agreements of June 4, 1973 and December 14, 1973 executed by General Chairman Pryor on behalf of defendant Union and by W. L. Schlager, Jr., President of LIRR, which modified a collective bargaining agreement of 1972 between the said Union and the LIRR.

Statement of Facts

The Defendant-Appellee, The Long Island Railroad Company, is a common carrier by railroad engaged in interstate commerce and, as such, is subject to the provisions of the Railway Labor Act, the Interstate Commerce Act and such other federal legislation regulating or affecting common carriers by railroad engaged in interstate commerce. The Defendant-Appellee, United Transportation Union (5), is a labor union and an unincorporated association which is the collective bargaining representative within the meaning of that term as defined in the Railway Labor Act of approximately 1400 of the Long Island Railroad's employees, being the crafts or classes of persons employed by The Long Island Railroad known as trainmen, ticket collectors, conductors, brakemen and switchtenders.

Pursuant to the provisions of the Railway Labor Act, the Long Island Railroad and the United Transportation Union (T) executed a collective bargaining agreement dated February 17, 1972.

Article 42 (a) and (b) of the February 17, 1972 Agreement provided as follows:

> "(a) Employes shall not be suspended or dismissed from service without a fair and impartial trial.
>
> "(b) When a major offense has been committed, an employe considered by the Rail Road to be guilty thereof may be held out of service pending trial and decision."

Thereafter, in order that the members of the union would not have to lose pay while attending hearings or trials on disciplinary matters, particularly when those matters were run failures, Harold Pryor, as General Chairman of the Union's General Committee of Adjustment, negotiated a simplified procedure with the Long Island Rail Road; and the terms thereof were set forth in the letter agreements of June 4, 1973 and December 14, 1973 executed by Walter L. Schlager,Jr., President of the Long Island Rail Road and Harold J. Pryor, General Chairman, United Transportation Union (28a - 29a; 30a - 31a).

Plaintiff Mills incurred a 15 day suspension for a third run failure on April 8, 1974, and an additional 30 day suspension for a fourth run failure on April 14, 1974. The imposition of discipline in both of those instances was deferred while plaintiff Mills

commenced an appeal to the American Arbitration Association pursuant to the provisions of the letter agreement dated June 4, 1973. While such arbitration was pending, plaintiff Mills together with plaintiff Simmons commenced the instant action. Subsequent to the commencement of this action and the service of the order to show cause and stay on May 21, 1974, plaintiff Mills, on May 31, 1974, incurred the discipline of dismissal for a fifth run failure and, accordingly, was removed from service. Plaintiff Mills contends that the letter agreements are invalid in that (1) they were made by General Chairman Pryor without approval of the Union's General Committee of Adjustment or by union members, and (2) they violate his constitutional right of due process.

POINT I

THE LETTER AGREEMENTS OF JUNE 4, 1973 and DECEMBER 14, 1973 MODIFYING THE 1972 COLLECTIVE BARGAINING AGREEMENT ARE VALID.

Plaintiff contends that the letter agreements of June 4, 1973 and December 14, 1973 were invalid in that the agreements were made by Chairman Pryor without the approval by the General Committee of Adjustment or the members of the union.

While Article 85 of the defendant Union's Constitution gives the General Committee of Adjustment the authority to make such agreements, it also specifically gives such power to the General Chairman between sessions of the General Committee as follows:

> "Between sessions of the General Committee of Adjustment, the Chairman of such Committee shall exercise all rights, privileges and authority vested in the General Committee, except as otherwise directed by the General Committee while in session."

Harold J. Pryor was General Chairman of the General Committee of Adjustment at the time he executed said letter agreements and, as such, is (under Article 87 of the defendant Union's Constitution) "its executive head" with the authority to "preside overall meetings and exercise general supervision over its affairs and interests". There is no requirement therein that the agreements made by the General Chairman between sessions of the General Committee must be ratified or approved by the General Committee of Adjustment or by the members of the defendant Union. The Union Constitution constituted the General Chairman with full and complete power and authority to make such agreements on behalf of the Union. The LIRR recognized this when it dealt with him. The General

Committee of Adjustment and the Union recognized this when they made no objection to the letter agreements made by the General Chairman; and plaintiff Mills recognized the General Chairman's authority by not raising objection thereto until the present Court action. It is well established that the constitution, rules and by-laws of an unincorporated association, if they are not immoral, contrary to public policy or unreasonable, constitute a contract between the members which the courts will enforce. 6 Am. Jur. 2d (Associations and Clubs) Section 8 p. 435; 3 N.Y. Jur. (Associations and Clubs) Section 4 pp. 341-342.

POINT II

PLAINTIFF'S FAILURE TO CHALLENGE THE AUTHORITY OF THE GENERAL CHAIRMAN WITHIN THE UNION'S APPELLATE PROCEDURE CONSTITUTES AN ESTOPPEL.

The defendant Union's Constitution set forth the proper procedure for a member of a local to appeal from the action or decision of a General Chairman. Article 75 subparagraph I (d) provides as follows:

> "A local or member of a local may appeal from an action or decision of a General Chairman to the General Committee of Adjustment, provided the appeal is filed within ninety (90) days from the date

> the action or decision occurred. Appeals to the General Committee of Adjustment must be filed with the Secretary of the General Committee and shall be acted upon not later than the next session of the General Committee of Adjustment."

And Article 75 subparagraph I (f) further provides that the decision of the General Committee could be appealed as follows:

> "An appeal from the decision of the General Committee of Adjustment may be made to a Board of Appeals provided the appeal is filed with the General Secretary and Treasurer within ninety (90) days from the date of the decision of the General Committee of Adjustment."

Plaintiff Mills has been Local Chairman (Passenger) Local 645, United Transportation Union, since 1970, and since that date has been an officer of defendant Union and a member of the defendant Union's General Committee of Adjustment. He knew the proper appeal procedures but chose not to follow same nor call a meeting (111a and 114a). In fact, even though the General Committee met after the letter agreements were executed, plaintiff Mills did not bring the letter agreements up for discussion before said Committee (112a).

Since plaintiff did not appeal the authority of General Chairman Pryor to execute said letter agreements in accordance with the requirement set forth in the defendant Union's Constitution, he is now estopped.

Article 28 of the defendant Union's Constitution states:

> "No officer, member, or subordinate body of the United Transportation Union shall resort to the civil courts to correct or redress any alleged grievance or wrong, or to secure any alleged rights from or against any officer, member, subordinate body, or the United Transportation Union until such officer, member, or subordinate body shall have first exhausted all remedy by appeal provided in this Constitution for the settlement and disposition of any such rights, grievances, or wrongs.
>
> "Any officer, member, or subordinate body of the United Transportation Union violating the provisions of this Article shall be subject to charges and trials as provided by this Constitution."

See also: International Association of Machinists v. Gonzales, 356 U.S. 617 (1958); Turnstall v. Brotherhood of Locomotive Firemen and Engineers, 323 U.S. 210 (1944).

POINT III

THE LETTER AGREEMENTS DID NOT TAKE AWAY ANY UNION MEMBERS' CONSTITUTIONAL RIGHTS.

Plaintiff contends that the letter agreements are invalid because they violate his constitutional rights of due process. Defendant Union disagrees. Prior to the June 4, 1973 and December 14, 1973 letter agreements, an employee could be taken out of service the very first time it was determined that he failed to appear for

his scheduled assignment. Under the terms of the letter agreements, it is now required that an employee be given a talk session for his first run failure and a reprimand for his second run failure; he cannot be taken out of service until his third run failure; and it is not until his fifth run failure within a twelve (12) month period that the employee is subject to dismissal (1[illegible]a). Prior to the June 4, 1973 agreement, he was subject to dismissal on the first occasion. These are considered by union members as beneficial advantages over the prior situation; now, a union member does not have to lose pay while attending hearings or trials on disciplinary matters for run failures on first or second offenses. And under the present letter agreements for a third or fourth run failure, if the employee exercises his right to appeal within ten (10) days, he is not removed from service (97a), but prior to the letter agreements, individuals on a third or fourth run failure could be and were many times removed from service pending the trial. In fact, the penalty of a 15 day suspension for a third run failure on April 8, 1974 and an additional 30 day suspension for a fourth run failure on April 14, 1974 was not imposed on plaintiff Mills when he appealed to the American Arbitration Association.

Before the June 4, 1973 letter agreement, when an employee was charged with a first, second or third run failure, or whatever the charge was, every bit of his performance (such as, for example, desertion from an assignment, stealing company money, violation of rulings, violation of operating rules, failure to make reports on time) could be taken into consideration and used as a basis for the discipline to be imposed (104a). But under the June 4, 1973 agreement, only run failures within a twelve (12) month period can be taken into consideration (104a). The new disciplinary procedure is neither severe nor does it constitute a harassment. It is important to note that it is not every run failure that is subject to disciplinary action. A determination that a member has failed to report is only made when no justifiable reason is shown for such failure. In practice, if a member fails to report and he has any reasonable excuse and produces evidence of the reason for the failure, the charge is washed out (105a). The disciplinary procedures set forth in the letter agreements are not arbitrary nor capricious, but constitute a fair and reasonable form of discipline not only beneficial to the Union employees and the LIRR, but to protect public safety. If a conductor fails to cover the assignment, there is a possibility of delay, and a substitute engineer might be

put in to move the train; and many times when a man is moved up to cover a brakeman's assignments, there may be additional cost to bring out a man and pay time and one-half (98a).

Thus, the letter agreements do not deprive plaintiff or any other union member of any constitutional right or infringe on his rights of due process, either under the State or Federal Constitution. The fact that plaintiff alleged a violation of his constitutional rights does not relieve or exempt him from the exhaustion requirement. Dorsey v. Chesapeake & Ohio Railway Company, 476 F2d 343 (CCA 4 Cir. 1973).

CONCLUSION

THE JUDGMENT DISMISSING THE COMPLAINT SHOULD BE AFFIRMED.

Dated: Roslyn Heights, New York
February 24, 1975

Respectfully submitted

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Transportation Union
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Edward T. Brown
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STATE OF NEW YORK)
) ss.:
COUNTY OF NASSAU)

ALICE L. BERUBE, being duly sworn, deposes and says: deponent is not a party to the action, is over 18 years of age and resides at 464 Marcellus Road, Mineola, New York.

On February 25, 1975 deponent served the within Brief of Defendant-Appellee, United Transportation Union, upon:

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GEORGE M. ONKEN, Esq.
Attorney for Defendant-Appellee,
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Jamaica Station
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by depositing a true copy of same enclosed in a post-paid properly addressed wrapper in official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Alice L. Berube

Sworn to before me this
26th day of February, 1975

Thomas J. Higgins

THOMAS J. HIGGINS
NOTARY PUBLIC, State of New York
No. 30-4782178
Qualified in Nassau County
Term Expires March 30, 1975